**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| | ) | |
| Petition of Qwest Corporation for Forbearance | ) | WC Docket No. 04-223 |
| Pursuant to 47 U.S.C. § 160(c) in the Omaha | ) | |
| Metropolitan Statistical Area | ) | |
| | ) | |

# MEMORANDUM OPINION AND ORDER

**Adopted: September 16, 2005** **Released: December 2, 2005**

By the Commission: Chairman Martin issuing a separate statement; Commissioners Copps and Adelstein concurring and issuing a joint statement.

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## I. INTRODUCTION

1. Last year, in the midst of intense facilities-based competition in the Omaha Metropolitan Statistical Area (MSA), Qwest Corporation (Qwest) filed a petition for forbearance pursuant to section 10 of the Telecommunications Act of 1996[1] from many of the statutory and regulatory obligations that apply to it uniquely as the former monopoly telephone company.[2] Today, we grant Qwest substantial relief from many of these obligations, where the level of facilities-based competition ensures that market forces will protect the interests of consumers and regulation is, therefore, unnecessary. Through this Order, we show that we are ready and willing to step aside as regulators and let market forces prevail where facilities-based competition is robust.

[1] 47 U.S.C. § 160; Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). The 1996 Act amended the Communications Act of 1934, 47 U.S.C. § 151 *et seq*. We refer to both of these Acts as the Act. When we want unambiguously to refer to the Telecommunications Act of 1996, we refer to it as the 1996 Act.

[2] Qwest seeks forbearance from the application of four categories of regulation in its service territory in the Omaha MSA: (1) dominant carrier regulation; (2) all section 251(c) obligations; (3) section 271(i)-(vi) and (xiv) competitive checklist requirements; and (4) all other regulations to which it is subject as an incumbent LEC. Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, WC Docket No. 04-223 (filed June 21, 2004) (Qwest Petition or Petition). Comments were filed in this proceeding on August 24, 2004, and reply comments were filed on September 23, 2004. *See Pleading Cycle Established for Comments on Qwest's Petition for Forbearance in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Public Notice, 19 FCC Rcd 11374 (WCB 2004); *Wireline Competition Bureau Extends Reply Comment Cycle on Qwest's Petition for Forbearance in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Public Notice, 19 FCC Rcd 14798 (WCB 2004). The Bureau extended the one-year deadline for acting on Qwest's Petition by 90 days. *See Qwest Corporation's Petition for Forbearance in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Order, 20 FCC Rcd 2531 (WCB 2005).

2. We grant Qwest forbearance from the obligation to provide unbundled loops and dedicated transport pursuant to section 251(c)(3) in those portions of its service territory in the Omaha MSA[3] where a facilities-based competitor has substantially built out its network. We also are persuaded by the evidence on the record to forbear from applying certain dominant carrier regulation to Qwest's provision of mass market switched access and broadband services in Qwest's service territory. With the exception of minor relief from sections 271 and 251(c)(6) that reflects the relief we grant from section 251(c)(3), we deny Qwest's Petition in all other respects. While each case must be judged on its own merits, and while we adopt herein no rules of general applicability, we expect our Order to provide incentives for facilities-based competitors to expand their deployment and service offerings in Omaha, and we look forward to the day when that competition justifies more of the relief Qwest seeks.[4]

## II. BACKGROUND

3. *Section 251(c) Requirements.* The Act includes a number of provisions designed to promote the development of competitive markets.[5] As noted above, Qwest seeks relief from all section 251(c) obligations, which are the duties to negotiate in good faith the terms and conditions of section 251(b) and (c) agreements; provide interconnection at any technically feasible point to any requesting telecommunications carrier at cost-based rates for the transmission and routing of telephone exchange service and exchange access service; provide UNEs for the provision of telecommunications service; offer for resale at wholesale rates any telecommunications service that the carrier provides at retail; provide reasonable notice of network changes; and provide collocation.[6]

4. In light of the scope of the relief we grant Qwest today – relief from many of its section 251(c)(3) obligations – we focus our section 251(c) background discussion on issues related to section 251(c)(3) in particular. The Commission previously has summarized the long and complex history of our unbundling regime since the passage of the 1996 Act.[7] Here, we offer only a brief review of recent regulatory developments as they affect the requirements most relevant to this proceeding.

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[3] Qwest's service territory in the Omaha MSA encompasses 24 wire center service areas in 5 counties in Nebraska and Iowa. Sixteen of these wire centers are located in Nebraska, and eight are located in Iowa. *See* Qwest Petition at 7, 19-20, n.60; *see also* Qwest Petition, Exhibit A, Affidavit of David L. Teitzel (Qwest Teitzel Aff.) at 2 n.3.

[4] This proceeding considers factors unique to the Omaha MSA. It does not consider and does not reach the situation where the incumbent LEC's primary competitor uses unbundled networks elements (UNEs), particularly unbundled loops, as the primary vehicle for serving and acquiring customers in the relevant market. Such a situation necessarily raises different issues with respect to our section 10 analysis. We do not consider or address them here.

[5] *See, e.g.*, 47 U.S.C. § 251.

[6] *See* 47 U.S.C. §§ 251(b), 251(c)(1)-(6); *see also* 47 C.F.R. §§ 51.301 (implementing section 251(c)(1)), 51.305 (implementing section 251(c)(2)), 51.301-19, 51.321, 51.323 (implementing section 251(c)(3)), 51.601-17 (implementing section 251(c)(4)), 51.325-35 (implementing section 251(c)(5)), 51.323 (implementing section 251(c)(6)).

[7] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 96-98, 98-147, 01-338, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 16992-17007, paras. 8-34 (2003) (*Triennial Review Order*), *aff'd in part, remanded in part, vacated in part, United States Telecom Ass'n v. FCC*, 359 (continued....)

5. Section 251(c)(3) imposes on incumbent LECs "[t]he duty to provide, to any requesting telecommunications carrier . . . nondiscriminatory access to network elements on an unbundled basis . . . in accordance with . . . this section and section 252." The Act does not identify which network elements are subject to the section 251 (c) (3) unbundling obligations.[8] Instead, Congress directed the Commission to determine what non-proprietary network elements must be unbundled under section 251(c)(3) after considering, at a minimum, whether access to a non-proprietary element on an unbundled basis would "impair" a requesting carrier's ability to provide service.[9] Under section 252, UNEs that must be offered pursuant to section 251(c)(3) must be made available at cost-based rates, as determined using the TELRIC methodology.[10]

6. In February 2005, the Commission released the *Triennial Review Remand Order*,[11] in which it revised the list of network elements that must be provided as UNEs. The Commission also modified its unbundling framework by making impairment determinations in part by drawing reasonable inferences about the prospects for competition in one geographic market from the state of competition in other, similar markets.[12] In making such inferences for high-capacity loops and transport, the Commission

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F.3d 554 (D.C. Cir. 2004) (*USTA II*), *cert. denied sub nom. Nat'l Ass'n Regulatory Util. Comm'rs v. United States Telecom Ass'n*, 125 S. Ct. 313, 316, 345 (2004).

[8] 47 U.S.C. § 251(c)(3).

[9] *See id.* §§ 251(d)(1), (2)(B). For proprietary network elements, the Act directs the Commission to consider whether access to such network elements is "necessary." *See id.* § 251(d)(2)(A). Almost all network elements have been considered "non-proprietary" and analyzed under section 251(d)(2)(B).

[10] *See id.* § 252(d)(1). The Commission established the TELRIC pricing methodology that state commissions must use to determine what are permissible cost-based rates incumbent LECs may charge for UNEs in the *Local Competition First Report and Order. Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499, 15846-50, paras. 679-89 (1996) (*Local Competition First Report and Order*) (subsequent history omitted) (establishing the TELRIC methodology and asking the states to perform the necessary analysis under this methodology). The Supreme Court upheld this allocation of federal and state jurisdiction, *see AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 377-86 (1999), and upheld the TELRIC pricing methodology, *see Verizon Communications v. FCC*, 535 U.S. 467 (2002). The Commission has initiated a separate proceeding in which it is comprehensively reviewing TELRIC. *Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*, WC Docket No. 03-173, Notice of Proposed Rulemaking, 18 FCC Rcd 18945 (2003).

[11] *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533, 2541, para. 12 (2004) (*Triennial Review Remand Order*), *appeal pending*, *Covad Communications Co. v. FCC*, Nos. 05-1095 *et al.* (filed Feb. 24, 2005). In August 2004, the Commission issued the *Interim Order and NPRM*, which sought comment on how to respond to the D.C. Circuit's *USTA II* decision. *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, WC Docket No. 04-313, Order and Notice of Proposed Rulemaking, 19 FCC Rcd 16783 (2004) (*Interim Order and NPRM*). To avoid excessive disruption of the local telecommunications market while it wrote the new rules created in the *Triennial Review Remand Order*, the Commission, among other things, also required incumbent LECs to adhere to the commitments they made in their interconnection agreements, applicable statements of generally available terms (SGATs) and relevant state tariffs that were in effect on June 15, 2004.

[12] *See, e.g.*, *Triennial Review Remand Order*, 20 FCC Rcd at 2546, para. 22.

adopted a wire-center-based analysis that used the number of access lines and fiber collocations in a wire center as proxies to determine impairment for high-capacity loop and dedicated transport UNEs.[13] The Commission also concluded on a nationwide basis that incumbent LECs did not have an obligation to unbundle mass market local circuit switching.[14]

7. *Section 271 Unbundling Requirements.* Section 271(c)(2)(B) of the Act sets forth a fourteen point "competitive checklist" of access, interconnection and other threshold requirements that a Bell operating company (BOC) must demonstrate that it satisfies before that BOC can be authorized to provide in-region, interLATA services.[15] After a BOC obtains section 271 authority to offer in-region interLATA services, these threshold requirements become ongoing requirements.[16] Because Qwest is a BOC that has been granted the authority to provide interLATA services in its in-region states, including Iowa and Nebraska, it is subject to the requirements of section 271(c)(2)(B).[17] In its Petition, Qwest seeks forbearance relief from checklist items 1 through 6 and 14.[18] Checklist items 1 through 3 and 14 establish the obligations to provide interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1); nondiscriminatory access to section 251(c)(3) UNEs; nondiscriminatory access to poles, ducts, conduits, and rights-of-way owned or controlled by the BOC in accordance with the requirements of section 224;[19] and the obligation to provide telecommunications services for resale in

[13] Specifically, the Commission found that competing carriers are impaired without access to DS1 transport except on routes connecting a pair of wire centers, where both wire centers contain at least four fiber-based collocators or at least 38,000 business access lines. It also found that competing carriers are impaired without access to DS3 or dark fiber transport except on routes connecting a pair of wire centers, each of which contains at least three fiber-based collocators or at least 24,000 business lines. Finally, the Commission found that competing carriers are not impaired without access to entrance facilities connecting an incumbent LEC's network with a competitive LEC's network in any instance. *Triennial Review Remand Order*, 20 FCC Rcd at 2536, para. 5. For enterprise loops, the Commission found that competitive LECs are impaired without access to DS3-capacity loops except in any building within the service area of a wire center containing 38,000 or more business lines and 4 or more fiber-based collocators. It also found that competitive LECs are impaired without access to DS1-capacity loops except in any building within the service area of a wire center containing 60,000 or more business lines and 4 or more fiber-based collocators. *See id.* The Commission also found that carriers are not impaired on a nationwide basis without access to unbundled dark fiber loops. *See id.* at 2633, para. 182.

[14] *See id.* at 2641-59, paras. 199-226; *see also USTA II*, 359 F.3d at 564-71. The Commission determined that competitive LECs are not impaired without access to unbundled mass market local switching, and that regardless of any potential impairment that may still exist, the costs associated with unbundling justified a decision not to unbundle pursuant to section 251(d)(2)'s "at a minimum" authority. *See Triennial Review Remand Order*, 20 FCC Rcd at 2643-44, paras. 202-04.

[15] 47 U.S.C. § 271(c)(2)(B); *see also* 47 U.S.C. § 153(4) (defining "Bell operating company").

[16] 47 U.S.C. § 271(d)(6).

[17] *See Application by Qwest Communications International, Inc. for Authorization to Provide In-region, InterLATA Services in the Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, WC Docket No. 02-314, Memorandum Opinion and Order, 17 FCC Rcd 26303 (2002) (*Qwest IA/NE Section 271 Order*).

[18] *See* Petition at 1.

[19] As originally enacted, section 224 was intended to address obstacles that cable operators encountered in obtaining access to poles, ducts, conduits, or rights-of-way owned or controlled by utilities. The 1996 Act amended section (continued....)

accordance with the requirements of sections 251(c)(4) and 252(d)(3).[20] Checklist items 4, 5, and 6 establish independent obligations to provide local loops, local transport, and local switching.[21]

8. In the *Triennial Review Order*, the Commission considered the relationship between sections 251 and 271. Based on its interpretation of the Act, the Commission concluded that checklist items 4 through 6, which, unlike the other checklist items listed above, do not incorporate by reference the requirements of section 251(c) or other provisions of the Act, constitute a distinct statutory basis for the requirement that BOCs provide competitors with access to certain network elements. Therefore, a BOC must provide access to network elements encompassed within the scope of checklist items 4 through 6, even if those elements are not subject to unbundling under section 251(c)(3).[22] The Commission explained that rates for network elements made available pursuant to checklist items 4 through 6 are governed not by the TELRIC standard that applies to section 251(c)(3) unbundling but instead by the "just and reasonable" standard of sections 201 and 202.[23] The D.C. Circuit affirmed the Commission's conclusions related to the section 271 obligations.[24]

9. After Qwest filed its Petition in the present proceeding, the Commission determined, in the *MDU Reconsideration Order*, that the section 706 considerations that partly justified the *Triennial Review Order*'s fiber-to-the-home (FTTH) unbundling relief[25] should be extended to encompass FTTH

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224 in several important respects to ensure that telecommunications carriers as well as cable operators have access to poles, ducts, conduits or rights-of-way owned or controlled by utility companies, including LECs. *See Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, Memorandum Opinion and Order, CC Docket No. 98-121, 13 FCC Rcd 20599, 20706, para. 171 n.574 (1998) (*Second BellSouth Louisiana Section 271 Order*); *see also* 47 U.S.C. § 224.

[20] *See* 47 U.S.C. §§ 271(c)(2)(B)(i)-(iii), (xiv). Sections 251(c)(2)-(4), and section 224 are discussed above. *See supra* notes 6, 19 and paras. 5-6. Section 252(d)(1), *inter alia*, establishes the pricing standard for UNEs. 47 U.S.C. § 252(d)(1). Section 252(d)(3) requires state commissions to "determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier." 47 U.S.C. § 252(d)(3).

[21] 47 U.S.C. § 271(c)(2)(B)(iv)-(vi); *see also Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. D/B/A Southwestern Bell Long Distance to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, Memorandum Opinion and Order, 15 FCC Rcd 18354, 18520, para. 336 (2000); *Second BellSouth Louisiana Section 271 Order*, 13 FCC Rcd at 20722, para. 207. The Commission has required that BOCs provide both dedicated and shared transport to requesting carriers. *See Second BellSouth Louisiana Section 271 Order*, 13 FCC Rcd at 20719, para. 201.

[22] *Triennial Review Order*, 18 FCC Rcd at 17382-91, paras. 649-67, *corrected by Triennial Review Errata*, 19 FCC Rcd 19020, 19022, paras. 30-33; *see also Triennial Review Order*, 18 FCC Rcd at 17384, para. 653.

[23] *Id.* at 17386-89, paras. 656-64, *corrected by Triennial Review Order Errata*, 18 FCC Rcd at 19022, paras. 32-33.

[24] *USTA II*, 359 F.3d at 588-90.

[25] In the *Triennial Review Order*, the Commission determined that incumbent LECs have no unbundling obligation for new fiber construction and for fiber overbuild situations where the incumbent LEC does not retire existing copper loops. *See Triennial Review Order*, 18 FCC Rcd at 17142, para. 273.

loops serving predominantly residential multiple dwelling units (MDUs).[26] Subsequently, in the *FTTC Reconsideration Order*, the Commission found that the FTTH analysis also applies to fiber-to-the-curb (FTTC) loops – which are loops that bring fiber from the central office to a location near the customer's premises – and granted the same unbundling relief to FTTC as applied to FTTH.[27] In the *Section 271 Broadband Forbearance Order*, the Commission granted all of the BOCs, including Qwest, forbearance from section 271 unbundling obligations for the broadband elements that the Commission, on a national basis, relieved from section 251(c)(3) unbundling in the *Triennial Review Order*, and subsequent reconsideration orders.[28] These elements include FTTH loops, FTTC loops, the packetized functionality of hybrid loops, and packet switching.[29]

10. *Dominant Carrier Regulation.* Under Title II of the Act, the Commission traditionally has applied a variety of regulations to carriers in order to protect consumers from unjust, unreasonable, and unreasonably discriminatory rates and practices. These regulations include requirements arising under section 214 related to transfer of control and discontinuance, cost-supported tariffing requirements, and price regulation for services falling under the Commission's jurisdiction.[30] The *Competitive Carrier Proceeding* considered revisions to the Commission's regulations to distinguish between carriers that are subject to effective competition in their respective telecommunications markets and those that are not.[31]

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[26] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Order on Reconsideration, 19 FCC Rcd 15856, 15858, paras. 7-9 (2004) (*MDU Reconsideration Order*).

[27] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Order on Reconsideration, 19 FCC Rcd 20293, 20297-303, paras. 9-19 (2004) (*FTTC Reconsideration Order*); *see also id.* at 20293, para. 1 n.1.

[28] *See Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c); SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c); Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c); BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, 19 FCC Rcd 21496, 21504, para. 19 (2004) (*Section 271 Broadband Forbearance Order*), *appeal pending, AT&T Corp. v. FCC*, No 05-1028 (D.C. Cir., filed Nov. 5, 2004). To the extent Qwest seeks identical relief in its present Petition, we deny its Petition to that degree as moot.

[29] *See Section 271 Broadband Forbearance Order*, 19 FCC Rcd at 21504, para. 19.

[30] *See* 47 U.S.C. § 214(a); *see also* 47 C.F.R. § 63.71; 47 C.F.R. §§ 61.38, 61.41-61.49; and 47 C.F.R. §§ 61.41-61.49, 65.

[31] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979); First Report and Order, 85 FCC 2d 1 (1980) (*Competitive Carrier First Report and Order*); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981); Second Further Notice of Proposed Rulemaking, FCC 82-187, 47 Fed. Reg. 17,308 (1982); Second Report and Order, 91 FCC 2d 59 (1982); Order on Reconsideration, 93 FCC 2d 54 (1983); Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 28,292 (1983); Third Report and Order, 48 Fed. Reg. 46,791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983) (*Competitive Carrier Fourth Report and Order*), *vacated, AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied, MCI Telecommunications Corp. v. AT&T*, 509 U.S. 913 (1993); Fifth Report and Order, 98 FCC 2d 1191 (1984); Sixth Report and Order, 99 FCC 2d 1020 (1985), *vacated, MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985) (collectively referred to as the *Competitive Carrier Proceeding*).

The Commission found that certain regulations that apply to all carriers under Title II are unnecessary for carriers that are subject to competition and therefore lack sufficient market power to engage in anticompetitive activity.[32]

11. Qwest asks us to forbear from applying dominant carrier regulation to its provision of telecommunications services in its service area within the Omaha MSA.[33] Because the Commission has in the past found that incumbent LECs, including Qwest, have market power in the provision of most services within their service areas, the rates that incumbent LECs may charge for certain services currently are subject to dominant carrier regulation.[34] Dominant carriers are subject to price cap or rate-of-return regulation, and must file tariffs for some services – on a minimum of seven days' notice and often more – and usually with cost support data.[35] Non-dominant carriers, on the other hand, are not subject to rate regulation and may file tariffs, on one day's notice and without cost support that are presumed lawful.[36] In addition, non-dominant carriers are required to wait only 30 days for their applications to discontinue, reduce, or impair service to be granted, as opposed to a 60-day grant period for dominant carriers.[37] Finally, dominant carriers are eligible for presumptive streamlined treatment for fewer types of transfer of control under section 214 than non-dominant carriers.[38]

12. *Regulation as an Incumbent Local Exchange Carrier.* Qwest requests forbearance from regulation as an incumbent LEC "pursuant to section 251(h)(l)."[39] Section 251(h)(1) defines an "incumbent LEC" as:

> with respect to an area, the local exchange carrier that – (A) on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service in such area; and (B)(i) on such date of the enactment, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or (ii) is a person or entity that, on or

[32] *See, e.g., Competitive Carrier First Report and Order*, 85 FCC 2d 1.

[33] *See* Petition at 1, 3, 5-21.

[34] *See Competitive Carrier First Report and Order*, 85 FCC 2d at 21, para. 58 (finding that control of bottleneck facilities is "prima facie" evidence of market power).

[35] *See* 47 U.S.C. §§ 203(b), 204(a)(3); 47 C.F.R. §§ 61.38, 61.41, 61.58; *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, CC Docket No. 96-187, Report and Order, 12 FCC Rcd 2170, 2182, 2188, 2191-92, 2202-03, paras. 19, 31, 40, 67 (1997).

[36] 47 C.F.R. §§ 1.773(a)(ii) and 61.23(c); *Tariff Filing Requirements for Non-dominant Carriers*, CC Docket No. 93-36, Order, 10 FCC Rcd 13653, 13653-54, paras. 3-4 (1995).

[37] 47 C.F.R. § 63.71(c).

[38] 47 C.F.R. § 63.03(b).

[39] *See* Petition at 38, 39.

after such date of enactment, became a successor or assign of a member described in clause (i).[40]

## III. DISCUSSION

### A. *Forbearance Standard*

13. The goal of the Telecommunications Act of 1996 is to establish "a pro-competitive, de-regulatory national policy framework."[41] An integral part of this framework is the requirement, set forth in section 10 of the 1996 Act, that the Commission forbear from applying any provision of the Act, or any of the Commission's regulations, if the Commission makes certain specified findings with respect to such provisions or regulations.[42] Specifically, the Commission is required to forbear from any statutory provision or regulation if it determines that: (1) enforcement of the regulation is not necessary to ensure that charges and practices are just and reasonable, and are not unjustly or unreasonably discriminatory; (2) enforcement of the regulation is not necessary to protect consumers; and (3) forbearance is consistent with the public interest.[43] In making such determinations, the Commission must also consider pursuant to section 10(b) "whether forbearance from enforcing the provision or regulation will promote competitive market conditions."[44] Section 10(d) specifies, however, that "[e]xcept as provided in section 251(f), the Commission may not forbear from applying the requirements of section 251(c) or 271 . . . until it determines that those requirements have been fully implemented."[45]

14. Consistent with our statutory obligations, in this Order we therefore apply the criteria of section 10 to the regulations and statutory provisions from which Qwest seeks relief.[46] As part of our forbearance analysis, and consistent with Qwest's Petition, we look to the Commission's previous

[40] 47 U.S.C. § 251(h)(1).

[41] Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113 (1996).

[42] 47 U.S.C. § 160(a).

[43] *Id.*

[44] *Id.* at § 160(b).

[45] *Id.* at § 160(d).

[46] We stress that our decision today is based on the totality of the record evidence particular to the Omaha MSA. The presence of a subset of similar facts in other markets – such as an equivalent degree of coverage by an incumbent cable operator that was not actively engaged in providing competitive telecommunications offerings over its own facilities – might result in a different outcome. *See, e.g.*, Letter from Jim Lamoureux, Senior Counsel, SBC Services, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223, at 2 (filed Sept. 12, 2005) (SBC Sept. 12, 2005 *Ex Parte* Letter) (stating that "[t]he characteristics of retail markets are distinct on many levels, and should be considered on a case-by-case basis. . . . much of the debate in this proceeding appears to have focused on market statistics that are unique to the Omaha area and are likely not applicable to other markets"); *see also* Letter from J.G. Harrington, Counsel to Cox, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223, Attach. at 5 (filed Sept. 14, 2005) (Cox Sept. 14, 2005 *Ex Parte* Letter) (stating that in some markets other than the Omaha MSA Cox relies on UNEs for certain facilities, illustrating why it is "important for the Commission to engage in fact-specific, market-by-market analysis in forbearance proceedings").

caselaw on dominance for guidance. We emphasize, however, that in undertaking this analysis, we do not issue any declaratory rulings, promulgate any new rules, or otherwise make any general determinations of the sort we would properly make in a rulemaking proceeding on a fuller record.[47] Accordingly, our sole task here is to determine whether to forbear under the standard of section 10 from the regulatory and statutory provisions at issue, and we do not – and cannot – issue comprehensive proclamations in this proceeding regarding non-dominance, non-impairment, or section 251(h) status in the Omaha MSA.[48]

### B. Dominant Carrier Regulation

15. We grant in part and deny in part Qwest's request for forbearance from the application of dominant carrier regulation to its provision of telecommunications services in the Omaha MSA. Specifically, we grant Qwest's request to forbear from applying our price cap, rate of return, tariffing, and 60-day discontinuance regulations for interstate mass market exchange access services and mass market broadband Internet access services, and deny its request for forbearance with regard to its enterprise services. We deny the remainder of Qwest's request for forbearance from applying any other dominant carrier regulation to these services, and to the extent it seeks forbearance from applying any dominant carrier regulation to its provision of other telecommunications services.

#### 1. Scope of Qwest's Petition Subject to Section 10

16. The Commission's first task is to identify the specific regulatory provisions at issue.[49] We focus our forbearance review to the rules and regulations that Qwest specifically identifies in its Petition: "(1) requirements arising under section 214 that apply to dominant carriers, (2) Sections 61.38 and 61.41-61.49, which require dominant carriers to file tariffs on up to 15-days notice with cost support; and

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[47] Thus, in today's Order, we do not craft any new tests for impairment or incumbent LEC status, or any other generally applicable tests we might fashion were a different category of petition before us. *See, e.g.*, 47 U.S.C. § 251(h)(2) ("The Commission may, *by rule*, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if" certain criteria are satisfied.) (emphasis added). Similarly, we are not persuaded by Qwest's arguments that "a regulation that is subject to a petition for forbearance may be retained only if the current record would justify adoption of the rule today," because neither section 10 nor the Commission's precedent directs us to re-examine whether a rule carries out the goals of a prior rulemaking. *See* Letter from Cronan O'Connell, Vice President – Federal Regulatory Affairs, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223, Attach. at 1-6 (filed Sept. 2, 2005) (Qwest Sept. 2, 2005 *Ex Parte* Letter); *see also* 47 U.S.C. § 160.

[48] Therefore, we reject commenters' proposals that we interpret and apply the section 251(c)(3) impairment standard or the section 251(h) standard to our forbearance analysis. *See, e.g.*, SBC Reply at 9-12; *see also* Letter from Thomas Jones, Counsel to Cbeyond Communications *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223 at 4-6 (filed Sept. 13, 2005) (Cbeyond *et al.* Sept. 13, 2005 *Ex Parte* Letter) (arguing that Qwest has not demonstrated the absence of impairment under section 251(c)(3)). Faced with a similar request for a non-dominance declaration as part of a forbearance petition, the Commission made clear that it did not make any findings regarding whether the petitioner was non-dominant for the provision of any service, and that the tariffing forbearance at issue was limited to the requirements raised in the petition. *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Memorandum Opinion and Order, 17 FCC Rcd 27000, 27008, para. 14 (2002) (*ASI Forbearance Order*).

[49] *ASI Forbearance Order*, 17 FCC Rcd at 27010, para. 18.

(3) Sections 61.41-61.49, and 65, which impose price cap and rate of return regulation on dominant carriers."[50] To the extent Qwest seeks relief from other regulations that apply to dominant carriers, its request is denied for failing to identify specific regulations or to explain how they meet the section 10 criteria.[51]

17. Although Qwest has not formally requested a declaratory ruling that it is non-dominant, we recognize the strong relationship between the statutory forbearance criteria and the Commission's dominance analysis, particularly with regard to the statutory assessment of competitive conditions and the goal of protecting consumers.[52] Specifically, section 10(a)'s mandate to forbear for a "telecommunications service, or class of . . . telecommunications service" in any or some of a carrier's "geographic markets"[53] closely parallels the Commission's traditional approach under its dominance assessments to product markets and geographic markets, respectively. Accordingly, as we evaluate the regulations at issue pursuant to the section 10 standard below, our inquiry is informed by the Commission's traditional market power analysis.

### 2. Application of Forbearance Criteria to Qwest's Petition

18. Through the *Competitive Carrier Proceeding*, the Commission established a regulatory framework to distinguish between dominant carriers, which have market power, and carriers classified as non-dominant, which lack market power.[54] Under the framework set forth in the *LEC Classification Order*, the Commission determines whether a carrier is dominant by: (1) delineating the relevant product and geographic markets for examination of market power; (2) identifying firms that are current or potential suppliers in that market; and (3) determining whether the carrier under evaluation possesses

[50] Petition at 31-32 (citations omitted).

[51] Neither Qwest nor any commenter has pointed to any authority that would compel the Commission to comb through its rules to infer which other regulations are encompassed by Qwest's general request, and as our precedent in the *ASI Forbearance Order* and *SBC IP Forbearance Order* indicates, this lack of specificity alone warrants dismissal. *See ASI Forbearance Order*, 17 FCC Rcd at 2705-06, para. 9 ("In addition to seeking forbearance from tariffing requirements, SBC requests that we declare it non-dominant in its provision of advanced services. SBC's petition, however, fails to request any specific forbearance relief, other than relief from tariffing regulation.") (footnote omitted); *Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, Memorandum Opinion and Order, WC Docket No. 04-29, FCC 05-95, paras. 14-17 (rel. May 5, 2005) (*SBC IP Forbearance Order*) (denying forbearance petition for, *inter alia*, lack of specificity).

[52] We are mindful that, when determining whether a carrier has market power in conducting a dominance analysis, the Commission must not limit itself to market share and look to all four factors that the Commission traditionally considers. *See AT&T v. FCC*, 236 F.3d 729, 736-37 (D.C. Cir. 2001). Because we do not undertake a stand-alone market power inquiry in this proceeding, this four-factor test does not bind our section 10 *forbearance* analysis.

[53] 47 U.S.C. § 160.

[54] *See supra* paras. 10, 11. Market power is defined as "the ability to raise prices by restricting output," or "to raise and maintain price above the competitive level without driving away so many customers as to make the increase unprofitable." *Competitive Carrier Fourth Report and Order*, 95 FCC 2d at 558, paras. 7, 8.

individual market power in that market.[55] The Commission defines relevant product markets by identifying and aggregating consumers with similar demand patterns.[56] The Commission has also explained that "[a] geographic market aggregates those consumers with similar choices regarding a particular good or service in the same geographical area," and that it would "treat as a geographic market, an area in which all customers in that area will likely face the same competitive alternatives for a product."[57]

19. Applying the section 10 criteria as informed by the dominance analysis, we forbear from applying certain dominant carrier regulations to Qwest's provision of mass market exchange access services, as well as mass market broadband Internet access services, because we find that all elements of section 10(a) have been satisfied. We decline to forbear from applying these dominant carrier regulations to Qwest's provision of enterprise services because Qwest has failed to demonstrate satisfaction of *any* of the three conjunctive section 10(a) forbearance criteria.

### a. Relevant Markets

#### (i) Product Market

20. Our inquiry is necessarily limited to those dominance regulations and statutory provisions over which the Commission has jurisdiction – dominant carrier regulation of interstate telecommunications services. Any dominant carrier regulation of local exchange service or other intrastate service is not subject to our forbearance authority.[58]

21. Qwest proposes, without further explanation, that the relevant product market "is the market for services provided under Section 251(c) and selected services under Section 271 provided within the

[55] *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, CC Docket No. 96-149, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd 15756, 15776, 15782 (1997) (*LEC Classification Order*)

[56] *See, e.g., Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's* Rules, CC Docket No. 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712, 14746, para. 68 (1999) (*SBC/Ameritech Order*); *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, Memorandum Opinion and Order, 13 FCC Rcd 18025, 18119, para. 164 (1998) (*WorldCom/MCI Order*).

[57] *Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of NYNEX Corporation and its Subsidiaries*, File No. NSD-L-96-10, FCC 97-286, Memorandum Opinion and Order, 12 FCC Rcd 19985, 20016, para. 54 (*BA/NYNEX Order*).

[58] Qwest Reply at 14 (stating that it does not seek the preemption of any existing state authority). We agree with the commenters who note the open-endedness of the scope of services for which Qwest seeks forbearance. *See* CompTel Comments at 20-21 (asserting that it is unclear from the Petition whether Qwest is asking for non-dominant status in the provision of exchange access services, which the Commission regulates, or in the provision of local exchange services, which the Commission does not regulate). We note that purely intrastate telecommunications services generally fall outside the Commission's jurisdiction.

boundaries of the Omaha MSA."[59] We find such a wide scope of services in this proposed definition to be unworkable as a single product market, especially because the services offered to mass market customers may not be adequate or feasible substitutes for services offered to business customers.[60] However, consistent with the statute's deregulatory intent,[61] and in an effort to conduct a thorough forbearance analysis that reflects the evidence compiled in the record, we disaggregate the telecommunications services that Qwest provides into more discrete classes.[62]

22. Accordingly, for purposes of evaluating Qwest's request for relief from dominant carrier regulation, we divide these interstate services into the mass market (residential consumers and small business customers) and the enterprise market (medium-sized and large business customers).[63] Our analyses of the mass market and enterprise market are not identical to, but are in accordance with, the Commission's past product market analyses for those services.[64] In addition, we also separate out mass market broadband Internet access services, consistent with the Commission's separate review of that market in prior merger proceedings.[65] Thus, within the mass market we look at both switched access

[59] Petition at 6.

[60] *SBC/Ameritech Order*, 14 FCC Rcd at 14746 para. 68.

[61] The 1996 Act was announced as "[a]n Act [t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Preamble, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (Preamble to the 1996 Act).

[62] We do not include Qwest's provision of interstate, interLATA service in this inquiry, because Qwest is currently non-dominant for these services. Pursuant to section 272 of the Act, Qwest provides these services through a section 272 affiliate, which is treated as non-dominant. *LEC Classification Order*, 12 FCC Rcd at 15802, para. 82 (classifying BOCs' section 272 affiliates as non-dominant in the provision of in-region, interstate, domestic interLATA services and in-region international services).

[63] In light of the evidence submitted into the record, which often distinguishes between residential and business customers but does not generally provide a more granular break-down between small and large businesses or other categories, we do not disaggregate the enterprise market further.

[64] In the past, for purposes of market power assessment, the Commission has divided services into the mass market (residential consumers and small business) and the enterprise market (larger businesses, namely medium-sized and large business customers). *See, e.g., SBC/Ameritech Order*, 14 FCC Rcd at 14746 para. 68; *WorldCom/MCI Order*, 13 FCC Rcd at 18119, para. 164. Unlike these decisions, which included local exchange service and exchange access services in the same product market, here we only examine exchange access services because section 10(a) focuses our inquiry on the target services to which our regulations apply.

[65] *See, e.g., Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, CS Docket No. 99-251, Memorandum Opinion and Order, 15 FCC Rcd 9816, 9861, para. 102 (2000) (identifying "broadband Internet services" to analyze the provision of broadband Internet services to residential customers); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, CS Docket No. 00-30, Memorandum Opinion and Order, 16 FCC Rcd 6547, 6568 para. 53 (2001) (identifying "high-speed Internet access services" to analyze the provision of residential high-speed Internet access services). Consistent with these decisions, mass market broadband Internet access services include the provision of high-speed Internet access over cable modem platforms as well as DSL platforms. *See Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, (continued....)

services and broadband Internet access services.[66] For the purposes of assessing forbearance from dominant carrier regulation, we reject suggestions from commenters that our section 251(c)(3) network element unbundling precedent controls our market framework.[67]

### (ii) Geographic Market

23. Qwest submits in its Petition that the geographic market where it seeks forbearance is the Omaha MSA, and clarifies in its Reply Comments that its intended geographic market is its service territory within the Omaha MSA.[68] Qwest represents that its service territory falls into only five of the eight counties in the Omaha MSA, and that it seeks relief in only those five counties that it listed in its original Petition.[69] Qwest also states that its service territory in the Omaha MSA includes 24 wire centers in the Omaha MSA, and that it therefore seeks relief throughout the territory served by those wire centers.[70] In its Petition, Qwest filed retail market data regarding the entire MSA, without disaggregating the state of competition by county, zip code, wire center or other more narrow geographic market.[71]

24. For the purposes of analyzing dominant carrier regulation of Qwest in this proceeding, we define the relevant geographic market here to be Qwest's service area in the Omaha MSA.[72] Qwest has proposed its service territory as the market and submitted its case consistent with that definition, so we begin our analysis with that region as the relevant geographic market unless the record indicates compelling reasons to narrow it.

(Continued from previous page)
Notice of Proposed Rulemaking, 16 FCC Rcd 22745, 22748, para. 5; *see also Section 271 Broadband Forbearance Order*, 19 FCC Rcd at 21506, para. 22-23. Our references in this order to "broadband" service signify high-speed rather than dial-up service.

[66] All special access services are addressed in the enterprise section, below.

[67] *See, e.g.*, McLeodUSA Comments at 4 (contending that the relevant market for a dominance evaluation is the wholesale market of loops and transport); TWTC Comments at 4-5 (arguing that the Commission held in the *Triennial Review Order* that the mass market, small and medium enterprise, and large enterprise segments comprise separate markets of telecommunications services).

[68] *See* Petition at 1; Qwest Reply at 17 (clarifying that Qwest is "only seeking forbearance in the territory *that it serves* within the Omaha MSA").

[69] *See* Qwest Reply at 17. Qwest has clarified these numbers in response to criticism from Cox and AT&T about Qwest's initial statement in its Petition that there are only five counties in the Omaha MSA. *See also* Cox Comments at 16; AT&T Comments at 7.

[70] *See* Petition at 19-20, n.60. Qwest states that it seeks relief in the following wire centers in Nebraska: Bennington, Elkhorn-Waterloo, Gretna, Omaha 78th Street, Omaha 84th Street, Omaha 90th Street, Omaha Bellevue, Omaha 135th Street, Omaha Fort Street, Omaha Fowler Street, Omaha 156th Street, Omaha Izard Street, Omaha Douglas, Omaha O Street, and Springfield and Valley. Qwest also seeks relief in the following wire centers in IA: Council Bluffs Manawa, Council Bluffs Downtown, Crescent, Glenwood-Mineola, Malvern, Missouri Valley, Neola and Underwood. *Id.*

[71] Qwest has supplemented certain aspects of the record with wire center-specific data.

[72] We emphasize that we make no findings with regard to the service territory of the other independent LECs in the Omaha MSA.

### b. Mass Market Services

25. On the basis of the evidence of competition on the record and the application of the section 10(a) statutory criteria, we conclude that enforcement of the listed dominant carrier regulations for mass market exchange access and broadband Internet access services is unwarranted. In particular, we find most persuasive that Cox has acquired a **[REDACTED]** share of the residential access market **[REDACTED]** Qwest, and that Cox has **[REDACTED]** share of the broadband Internet access market.[73] Our forbearance from the application of the dominant carrier regulations before us today is conditioned upon Qwest's compliance with competitive carrier requirements, and in no instance is Qwest to be subject to less regulation than any competitive LEC. We reach these conclusions by examining the state of competition in Qwest's service territory in the Omaha MSA for mass market services, including market share, demand and supply elasticities, and Qwest's size, resources, and technical capabilities.

#### (i) Section 10(a)(1) – Charges, Practices, Classifications, and Regulations

26. Section 10(a)(1) requires that we determine whether enforcement of the regulations at issue is not necessary to ensure that charges, practices, classifications or regulations by Qwest are not unjustly or unreasonably discriminatory.[74] In its Petition, Qwest argues broadly that dominant carrier regulation of Qwest's "local telephone services" in the Omaha MSA is no longer necessary to ensure that Qwest's rates and practices are just, reasonable and not unreasonably discriminatory, and that Qwest therefore satisfies the criteria of Section 10(a)(1) of the 1996 Act.[75] More specifically, it contends that the Omaha MSA telecommunications market has become highly competitive, that no carrier has market power, and that there is no longer any regulatory justification for applying unique regulatory requirements to any single carrier as "dominant."[76] Qwest asserts that requirements other than dominant carrier regulation, such as sections 201 and 202 of the Act, are sufficient to protect consumers from any carrier attempting to charge unreasonable rates.[77]

27. We conclude that the Commission's relevant rules on dominant carrier price caps, rate of return, tariffing, rate averaging, and discontinuance are no longer necessary to ensure that Qwest's rates and practices are just, reasonable, and not unjustly or unreasonably discriminatory for the services in the product market at issue below. We recognize, however, the special problem of carrier's carrier charges –

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[73] *See infra* para. 28.

[74] *See* 47 U.S.C. § 160(a)(1).

[75] *See* Petition at 32.

[76] *Id.*

[77] *See id.* at 33 (citing 47 U.S.C. §§ 201, 202). Section 201 of the Act mandates that carriers engaged in the provision of interstate or foreign communication service provide service upon reasonable request, and that all charges, practices, classifications, and regulations for such service be just and reasonable. 47 U.S.C. § 201. Section 201 also empowers the Commission to require physical connections with other carriers, to establish through routes, and to determine appropriate charges for such actions. *Id.* Section 202 states that it is unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services, or to make or give any undue or unreasonable preference or advantage to any person or class of persons. 47 U.S.C. § 202.

that all LECs have monopoly power over the rates that they charge carriers wishing to terminate calls to LECs' end user customers. Our analysis below discusses the competitive environment in general, and addresses why certain dominant carrier regulations are not necessary to check Qwest rates and practices with regard to its own end users. We address the special problem of carrier's carrier charges separately below.

### (a) Market Share

28. *Mass Market Switched Access Service.* For this factor, we find compelling that Qwest has less than **[REDACTED]** percent of the market for residential access lines in Qwest's service territory in the MSA, based upon Qwest's and Cox's own submitted data. To reach a determination with regard to the mass market for switched access services, we find that the data Qwest and Cox have submitted regarding residential customers are a reasonable proxy for the number of mass market customers served by each carrier.[78] Qwest reports that as of December 2004, it had **[REDACTED]** residential retail access lines.[79] Cox submits that as of May 1, 2005, it had **[REDACTED]** residential lines.[80]

29. Although we are confident that the evidence in this record demonstrates that Qwest has less than **[REDACTED]** of the relevant share of the mass market for switched access, we are unable to calculate an absolute figure based on that record.[81] No state regulatory compilations of the number of access lines for the geographic market in question were submitted in this proceeding, and no carriers other than Qwest or Cox submitted data in this proceeding detailing the number of residential access lines. Our market share estimates are also supported by Qwest's evidence regarding E911 data. Relying on estimates from an E911 database administrator from April 2004 as "a directional surrogate for the number of access lines served by facilities-based CLECs," in combination with competitive LEC resale and UNE-P data as of February 2004 and its own retail access line data, Qwest submits that the

[78] Although the Commission's customer class distinction for assessment of dominance traditionally distinguishes between mass market customers and enterprise market customers, Qwest and Cox submitted their customer data grouped in categories of "residential" customers and "business" customers. Due to these similarities between the kinds of services that residential customers and very small business customers purchase, as well as how carriers market and provide service to them, we find that the economic considerations that lead to the provision of service to a residential customer are similar to the economic considerations that lead to the provision of service to a very small business customer. It therefore is reasonable for us to treat the data Qwest and Cox have submitted regarding residential customers as a proxy for the number of mass market customers served by each carrier. Even if Qwest and Cox have omitted very small businesses from their residential access line counts, this omission would have only a negligible affect on our analysis of this market.

[79] Letter from Cronan O'Connell, Vice President – Federal Regulatory Affairs, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223, Attach. 1 at 5 (filed May 20, 2005) (Qwest May 20, 2005 *Ex Parte* Letter). Qwest's retail access line base in the Omaha MSA has declined by **[REDACTED]** percent over the last several years, falling from **[REDACTED]** in December 1997. *Id.*

[80] Letter from J.G. Harrington, Counsel to Cox, to Marlene Dortch, Secretary, FCC, WC Docket No. 04-223 at 3 (filed Jun. 30, 2005) (Cox June 30, 2005 *Ex Parte* Letter).

[81] *See supra* para. 28.

competitive LEC market share of residential access lines in Qwest's service territory in the Omaha MSA is **[REDACTED]** percent.[82]

30. *Mass Market Broadband Internet Access Service.* Qwest has **[REDACTED]** of the market for broadband Internet access service. Cox does not dispute Qwest's contention that Cox **[REDACTED]** of the broadband subscriber base in the Omaha MSA. Qwest submits that, based on Cox's national cable modem subscribership penetration rate of 24.6 percent, Cox has approximately 86,000 cable modem subscribers in the Omaha MSA, compared to **[REDACTED]** DSL subscribers for Qwest as of December 2004.[83] Cox confirms that Qwest's figure is a "reasonable estimate" of Cox's broadband Internet access base.[84] Again, while we are unable to calculate a precise market share figure based on the record before us in this proceeding, there is no dispute that Cox's mass market broadband Internet access subscriber base **[REDACTED]** Qwest's.

### (b) Market Elasticities and Structure

31. Apart from strict measurement of market share, as part of our forbearance analysis we also examine other economic factors relevant to determining whether enforcement of dominant carrier regulation is necessary to ensure that Qwest's practices in offering interstate mass market switched access services are just, reasonable, and not unjustly or unreasonably discriminatory. In reaching conclusions regarding dominance, the Commission looks beyond market share, and evaluates factors such as demand and supply elasticities, and the firm's cost, structure, size and resources.[85] While not controlling, such indicia can be of relevance to our analysis, so we examine them accordingly.

32. *Demand Elasticity.* A firm's demand elasticity refers to the willingness and ability of a firm's customers to switch to another provider or otherwise change the amount of services they purchase from that firm in response to a change in price or quality of the service at issue.[86] High firm demand elasticity indicates customer willingness and ability to switch to another service provider in order to obtain price reductions or desired features. Moreover, it also indicates that the market for that service is subject to competition.[87]

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[82] Qwest Teitzel Aff. at 6-8. Qwest has transitioned 90 percent of all of its UNE-P facilities region-wide to the Qwest Platform Plus (QPP) commercial product. Qwest May 20, 2005 *Ex Parte Letter* at 2. Although Qwest's Petition indicates that the E911 database records are from communities in the Omaha MSA, Qwest Teitzel Aff. at 7, Qwest later clarifies that the line counts in the Petition reflect "only . . . E911 records in the wire centers in Qwest's serving territory in the MSA." Qwest May 20, 2005 *Ex Parte* Letter, Attach. 1, Tab 5.

[83] Qwest May 20, 2005 *Ex Parte* Letter, Attach. 1 at 17.

[84] Letter from J.G. Harrington, Counsel to Cox, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223, Attach. at 1 (filed Sept. 15, 2005).

[85] *Petition Pursuant to Section 10(c) of the Communications Act of 1934, as Amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier*, Order and Notice of Proposed Rulemaking, 13 FCC Rcd 14083, 14118-19, para. 67 (1998) (*Comsat Order*); *see also AT&T v. FCC*, 236 F.3d at 731.

[86] *Comsat Order*, 13 FCC Rcd at 14120, para. 71.

[87] *Id.*

33. In assessing demand elasticities for mass market exchange access services, we recognize here as we did in the *CLEC Access Charge Order* that competitive carriers serve two distinct customer groups – end users for long distance calls, and interexchange carriers.[88] With regard to the end user market, we find the demand elasticity in the mass market interstate exchange access market to be high. The Commission has repeatedly found that residential customers are highly demand-elastic, and willing to switch to or from their provider to obtain price reductions and desired features.[89] Nothing in this record indicates otherwise for residential or other mass market customers, and the growth in Cox's residential access line base and corresponding decline in Qwest's base, as described above, fully supports our forbearance determination here. As for concerns of interexchange carriers' inability to switch providers and the terminating access monopoly, we explain below that we impose upon Qwest the same obligations as all other competitive LECs as a condition of our relief, and conditionally modify the pricing mechanism for carriers' carrier charges.[90]

34. We make a similar finding of high demand elasticity for mass market broadband Internet access services. In previous decisions, the Commission has determined that customers can and do choose between competing DSL and cable modem providers, and the record in the instant proceeding is consistent with those cases.[91]

35. *Supply Elasticity*. In general, supply elasticity refers to the ability of suppliers in a given market to increase the quantity of service supplied in response to an increase in price. The Commission uses this "to determine the ability of alternative suppliers in a relevant market to absorb a carrier's customers if such carrier raised the price of its service by a small but significant amount and its customers wished to change carriers in response."[92] Two factors determine supply elasticity: (1) whether existing competitors have or can relatively easily acquire significant additional capacity, in which case supply elasticities are high, and (2) the absence of significant barriers to entry, be they legal (*e.g.*, government imposed restrictions), economic (*e.g.*, capital costs, economies of scale), technological (*e.g.*, a new innovation protected by a patent), or operational (*e.g.*, lack of skilled workers).[93]

36. The record of competition compiled in this proceeding and, significantly, the other market-opening regulations that we leave in place today, support our finding that supply elasticity in this market

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[88] *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, 9938, para. 38 (2001) (*CLEC Access Charge Reform Order*).

[89] *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, FCC 95-427, Order, 11 FCC Rcd 3271, 3305, para. 63 (1995) (*AT&T Reclassification Order*).

[90] *See infra* paras. 39-41.

[91] *See Section 271 Broadband Forbearance Order*, 19 FCC Rcd 21496, 21506, para. 22; *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Notice of Proposed Rulemaking, 16 FCC Rcd 22745, 22748, para. 5; *Applications of Nextel Communications, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 05-63, Memorandum Opinion and Order, FCC 05-148, para. 167 (rel. Aug. 8, 2005).

[92] *Comsat Order*, 13 FCC Rcd at 14123, para. 78.

[93] *See id.* at 14123-24, para. 78; *see AT&T Reclassification Order*, 11 FCC Rcd at 3303, para. 57.

is high for all mass market services. Cox's extensive facilities build-out in the Omaha MSA, and growing success in luring Qwest's mass market customers, indicates that the first factor is easily satisfied for both switched access and broadband Internet access services.[94] Moreover, with regard to switched voice services, the number of resold lines and QPP lines are also not insignificant.[95]

37. For many of the same reasons as above, we find that the barriers to entry in the Omaha MSA for switched access services are low. We are mindful that this determination relies heavily on the availability of section 251(c) and other pro-competitive regulations that we leave undisturbed in this Order. In particular, our rejection of Qwest's request for forbearance from its section 251(c) duty to provide interconnection and collocation at cost-based rates, as well its obligation to proved resale at avoided cost rates, helps to ensure that existing and new competitors can enter the exchange access market. Our decision to deny Qwest's request for forbearance from all section 251(c) and 271 obligations – other than those arising under section 251(c)(3) regarding transmission facilities, and the section 271 checklist requirements that correlate to those section 251(c)(3) transmission facilities – addresses many of the concerns raised by the Iowa and Nebraska commissions in particular,[96] as well as other commenters.[97]

38. *Firm Cost, Size, Resources.* We find that the record before us is consistent with forbearance in the context of mass market switched access and broadband Internet access services because compared to Cox, Qwest does not have sufficiently lower costs, sheer size, superior resources, financial strength, or technical capabilities to warrant retaining the regulations in question. Under the relevant precedent, the issue at this point in our dominance analysis would be not whether Qwest has advantages, but "whether any such advantages are so great to preclude the effective functioning of a competitive market."[98] We

[94] We describe Cox's build-out in Part III.E.1.c.(ii), *supra*.

[95] Qwest reports that it provides at least **[REDACTED]** QPP residential lines. *See* Qwest May 20, 2005 *Ex Parte* Letter, Attach. 1 at Tab 8. Qwest also reports that as of April 2004, provided to its competitors **[REDACTED]** resold residential lines, and **[REDACTED]** UNE-P residential lines. Qwest Teitzel Aff. at 8. As noted above, Qwest has transitioned 90 percent of all of its UNE-P facilities region-wide to the QPP commercial product. *See supra* note 82.

[96] With regard to Council Bluffs, which is part of Qwest's service territory in the Omaha MSA, the Iowa Utilities Board comments that "[t]he Council Bluffs retail market has developed a level of competition that was envisioned by the passing of the 1996 Telecommunications Act," but that "[i]f the level of retail competition in the Council Bluffs market is to remain at its current level or improve, competitors will need to have access to the wholesale facilities and services as they do today." Iowa Utils. Bd. Comments at 3-4. The Iowa Utilities Board goes on to express particular concerns about removing certain requirements of interconnection, namely, the duty to negotiate in good faith; providing facilities and equipment; allowing nondiscriminatory access and interconnection to network elements and facilities; allowing physical collocation; and providing retail services at wholesale rates for resale by competitors. *Id.* at 4. In disagreeing with Qwest's request for forbearance, the Nebraska Commission notes that all competitive LECs still rely heavily on sections 251(c) and 271, and highlighted the obligations to interconnect at any point; to allow collocation; and to negotiate in good faith. Nebraska PSC Comments at 1-2.

[97] *See, e.g.*, McLeodUSA Comments at 7-8 ("McLeodUSA submits that the fact that competitors have been able to increase their number of lines is simply because they are able to obtain the bottleneck facilities controlled by Qwest under the specific terms of Section 251 and 271.").

[98] *See AT&T Reclassification Order*, 11 FCC Rcd at 3309, para. 73, *citing First Interexchange Competition Order*, 6 FCC Rcd at 5891-92.

find that even if Qwest has some advantages regarding lower costs, sheer size, superior resources, financial strength, or technical capabilities – an issue we do not decide in the abstract – Qwest does not have such advantages relative to Cox in the Omaha MSA. The record reveals that Qwest's most significant competitor in the Omaha MSA is Cox.[99] Cox, like Qwest, is a large business that competes in numerous states in the provision of a range of telecommunications services with demonstrated technical capabilities.[100] For instance, Cox readily submits that it is "the leading competitive provider of facilities-based local telephone service, with well over one million lines in service."[101] Qwest also is subject to competition from other established carriers in the Omaha MSA of significant size.[102] There is no evidence in the record to indicate that Qwest could leverage the factors relevant here to sustain prices profitably above the competitive level.

### (c) Specific Forbearance Granted

39. *Price Cap and Tariffing Forbearance for Exchange Access Services.* Due to Qwest's loss of **[REDACTED]** residential access lines and our analysis of the other factors above,[103] we find that, subject to certain conditions, enforcement of our dominant carrier price cap rules is not necessary to ensure that Qwest's charges, practices, or regulations are just, reasonable, and not unjustly or unreasonably discriminatory with regard to the prices Qwest charges to its own end users. We conclude that enforcing price caps is not necessary, and we forbear from those regulations accordingly. We, however, condition our forbearance from applying section 61.41 price caps to Qwest's mass market access service charges on Qwest's compliance with regulations that apply to all competitive LECs, in particular section 61.26 of the Commission's rules.

40. In the *CLEC Access Charge Reform Order*, the Commission found that interexchange carriers are subject to the monopoly power that all competitive LECs wield over access to their end users, and that carriers' carrier charges cannot be fully deregulated.[104] As a result, the Commission has imposed a detariffing regime through section 61.26 that permits the filing of tariffs on one day's notice without cost support (and presumes the access charges that competitive LECs charge their carrier customers to be just and reasonable) where the rates are at or below a benchmark that is "the rate of the competing ILEC."[105] Competitive LECs are subject to mandatory detariffing of any rates that exceed the

[99] Petition at 8-9; Qwest Teitzel Aff. at 8.

[100] *See, e.g.*, Qwest Teitzel Aff. at 10-13.

[101] Cox Comments at 1. Cox also provides a number of business services at the national level, which presumably would tend to increase its purchasing power with suppliers. Qwest Teitzel Aff. at 12 (claiming that at EOY 2002, "Cox Business Services was realizing almost $1.2M per month in revenue, from almost 16,000 business customers").

[102] *See, e.g.*, Qwest Teitzel Aff. at 18 (citing McLeodUSA's fourth quarter and total year 2003 results disclosing that nationwide McLeodUSA serves "approximately 28,000 customers valued at $9.5 million of revenue").

[103] *See supra* paras. 28-38.

[104] *CLEC Access Charge Reform Order*, 16 FCC Rcd at 9938, para. 38.

[105] *Id.* at 9925, para. 3; *see also* 47 C.F.R. § 61.26.

benchmark;[106] otherwise, the Commission does not regulate the rates charged pursuant to any other arrangement that competitive LECs may reach with interexchange carriers.

41. To ensure that our forbearance today does not result in rates that are unjust or unreasonable, and in light of the "unique nature" of the access market,[107] we therefore condition this forbearance upon the same regime under which competitive LECs currently operate. Specifically, we extend to Qwest the current benchmark that applies to all of its competitors – Qwest's tariffed rate as of July 1, 2005 – which will also serve as the benchmark for other LECs operating within Qwest's service territory in the MSA. Thus, if Qwest charges switched access rates to its carrier customers equal to or below this benchmark, it is not required to file a tariff at all, or may file a tariff on one day's notice without cost support. If it charges more, it may not file a tariff.[108] As with competitive LECs, we impose no such restriction on the rates Qwest may charge its own end user customers. Rather, for the reasons stated above, we believe competitive forces are sufficient to constrain those rates. For these reasons, we also forbear from applying any dominant carrier tariffing requirements to Qwest for mass market switched access services, conditioned upon its compliance with the same permissive detariffing obligations that apply to Cox and other competitive LECs.

42. *Rate of Return and Tariffing Forbearance for Broadband Internet Access Services.* We find that continued application of our section 61.38 cost support and Part 65 rate of return regulations to Qwest's broadband Internet access transmission services is not necessary to ensure that Qwest's charges, practices, or regulations are just, reasonable, and not unjustly or unreasonably discriminatory so long as Qwest is subject to the same treatment as non-dominant carriers under those rules. Continuing to subject Qwest to these rules for its DSL services is no longer appropriate in light of its place in the broadband Internet access market in Qwest's service territory in the Omaha MSA. Qwest's DSL offering need not be regulated any more than that of any other competitive LEC to prevent improper discrimination. Thus, Qwest may file tariffs on one day's notice without cost support, or may file no tariffs.

43. *Discontinuance and Streamlined Transfer of Control Forbearance.* For all mass market switched access and broadband Internet access services, we find that continued application of our dominant carrier discontinuance rules is not necessary to ensure that Qwest's charges, practices, or regulations are just, reasonable, and not unjustly or unreasonably discriminatory so long as Qwest is subject to the same treatment as non-dominant carriers under those rules.[109] We conclude that subjecting

[106] *CLEC Access Charge Reform Order*, 16 FCC Rcd at 9938, para. 40.

[107] *Id.* at 9938, para. 39.

[108] We reject Cox's proposal that, to the extent relief is granted, the Commission allow competitive LECs in Omaha to maintain their access charge rates for no less than 60 days after Qwest changes its tariffed rates. Cox Comments at 37. Cox argues that in order for a competitive LEC to keep its rates at or below the incumbent LEC's, it must have "adequate notice" of the incumbent LEC's rates so that it has "the opportunity to analyze Qwest's new rate, to determine whether it is reasonable, and to decide whether to adjust its own rate to conform to Qwest's rate or to challenge the new rate as unreasonable under Sections 201 and 208 of the Act." *Id.* at 37-38. Because we subject Qwest to the *CLEC Access Charge Reform Order*'s benchmark regime, we do not share MCI's concern that price caps are necessary because the Commission previously has found that the switched access market is not structured to constrain competitive LEC rates. MCI Comments at 16-17 (citing *CLEC Access Charge Reform Order*, 16 FCC Rcd at 9936, para. 33).

[109] 47 C.F.R. §§ 63.03(b)(2), 63.71(a)(5), (b)(4), (c).

Qwest to a 60-day automatic grant period for discontinuance of service, and a 30-day comment period for affected customer notice, is not necessary under section 10(a)(1), where Cox and other competitive LECs are subject to a 30-day automatic grant period and 15-day comment period. Where the majority of customers have selected carriers other than Qwest, we find that continuing to impose more onerous discontinuance requirements is no longer necessary to ensure just, reasonable, and not unjustly or unreasonably discriminatory charges and practices. However, to maintain sufficient customer protection to ensure the justness and reasonableness of Qwest's practices, we predicate this relief upon Qwest's compliance with the discontinuance rules that apply to non-dominant carriers. Similarly, we forbear from applying our streamlined transfer of control rules to Qwest as a dominant carrier, conditioned upon treatment of Qwest as a non-dominant carrier.

### (ii) Section 10(a)(2) – Protection of Consumers

44. The second criterion under section 10 requires that we assess whether enforcement of our dominant carrier regulations to mass market interstate switched access and mass market broadband Internet access services is unnecessary for the protection of consumers.[110] Qwest claims that it satisfies the criteria of section 10(a)(2) because the "high level of facilities-based competition, the lack of entry barriers, and the vitality of existing competitors will provide all the product, price, service and choice protection that consumers need."[111] It further argues that customers in the Omaha MSA are being deprived of the full benefits of competition because of the continued regulation of Qwest as a dominant carrier.[112]

45. For many of the same reasons that led us to conclude that section 10(a)(1) is satisfied, we also conclude that section 10(a)(2) is satisfied with regard to a limited set of dominant carrier regulation – price caps, rate of return, tariffing and section 214 regulation. Most notably, in light of Cox's capture of **[REDACTED]** residential access lines compared to Qwest's **[REDACTED]**, continuing to subject Qwest to these requirements does not enhance consumer protection."[113] Subjecting Qwest to heightened price cap and rate of return regulation simply hinders its efforts to compete to re-acquire these customers and does not protect consumers. In the interest of enhancing customer choice, forbearance is warranted, and we find that the dominant carrier regulations at issue are no longer necessary to protect consumers.

### (iii) Section 10(a)(3) – Public Interest

46. The third criterion of section 10 requires that we determine whether forbearance from applying our dominant carrier regulations, including our tariff filing requirements, our section 214 transfer requirements, and our price cap regulations is consistent with the public interest.[114] In making this determination, the Commission shall consider whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of

[110] 47 U.S.C. § 160(a)(2).

[111] Petition at 34.

[112] Petition at 35.

[113] *See supra* nn. 79, 80.

[114] 47 U.S.C. § 160(a)(3).

telecommunications services.[115] Qwest argues that if the Commission continues to regulate it as a dominant carrier in the Omaha MSA telecommunications market, it will "hobble Qwest's ability to compete for customers, and would continue competitive distortions that do not serve the public interest."[116] Qwest also notes that in the *AT&T Non-Dominance Order*, the Commission describes the significant costs of continued asymmetric regulation.[117] Qwest insists that continued dominant carrier regulation of its services in the Omaha MSA will involve these same costs.[118]

47. Similarly, we conclude that forbearing from our dominant carrier regulations that apply to interstate switched access and broadband Internet access services is consistent with the public interest.[119] Specifically, we find that it will enhance the vigorous local exchange competition that has emerged in the Omaha MSA, and will serve the public interest, if we no longer apply to Qwest the dominant carrier regulations that apply to such services, including our tariff filing requirements, our section 214 requirements, and our price cap regulations.[120] As stated above, Qwest serves less than **[REDACTED]** percent of the residential access lines in the interstate exchange access services market in the Omaha MSA – a market with high supply and demand elasticities for end user customers.[121] Qwest's share of the broadband market is **[REDACTED]**.[122] In these environments that are competitive for end users, applying these dominant carrier regulations to Qwest limits its ability to respond to competitive forces and, therefore, its ability quickly to offer consumers new pricing plans or service packages.

48. We do not believe that a lack of regulation will harm end user competition or consumers. For instance, regarding price cap requirements and end user selection of competing providers, we believe that market pressures created by Cox and others will force Qwest to price its mass market interstate exchange access services competitively, or face further loss of market share for these services.[123] As

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[115] 47 U.S.C. § 160(b).

[116] Petition at 36.

[117] *Id.* (pointing to the Commission's description of the disincentives to innovate due to loss of the so-called "first-mover advantage" caused by longer tariff notices; the disincentive for AT&T to reduce prices; the ability of AT&T's competitors to delay and undermine its initiatives; and the unique administrative and overhead costs on both AT&T and the Commission which flowed into AT&T's prices).

[118] *See* Petition at 36. Qwest states that the 15-day tariff notice requirement that applies to it gives competitive LECs the opportunity to respond to Qwest's filed rate service changes or to get to market first with a new price or service offering before Qwest's tariff becomes effective. Qwest further states that, as a dominant carrier, it is also uniquely prohibited from responding to competition with deaveraged rates within the study area. *Id.*

[119] 47 U.S.C. § 160(a)(3).

[120] In making our determination under section 10(a)(3), Congress has directed the Commission to consider whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services. *See* 47 U.S.C. § 160(b).

[121] *See supra* para. 28.

[122] *See supra* para. 30.

[123] Again, we rely on the benchmark condition described above to correct for the fact that the access service market otherwise does not allow competition to discipline rates.

another example, and for the same reason, we conclude that no longer enforcing against Qwest requirements that it provide cost-support for its tariffs as currently required by section 61.49 of the Commission's rules is consistent with the public interest.[124] Significantly, we also find that our conditional price cap benchmark is a protection against harming competitive harms. Again, we believe that Qwest is subject to sufficient competition from Cox that it will price its mass market interstate switched access and mass market broadband services competitively without this level of burdensome regulatory oversight.

49. Indeed, as Qwest argues, forbearing from the application to Qwest of these dominant carrier requirements will increase competition in the market by freeing Qwest from unnecessary regulatory burdens. At a minimum, we believe that forbearing from dominant carrier regulation in the Omaha MSA will serve the public interest by increasing the regulatory parity among providers of mass market interstate exchange access services in the Omaha MSA. As a result of our decision today, the playing field between Qwest and Cox will be leveled to the extent Qwest will no longer be the only carrier in its service territory in the Omaha MSA subject to dominant carrier regulations that apply to mass market interstate exchange access services. In light of the fact that Qwest's share of this market, when compared with Cox's share, is **[REDACTED]**, we believe this outcome is warranted and serves the public interest.[125] For DSL services, where the market share is approximately 86,000 for Cox compared to **[REDACTED]** for Qwest, the regulatory parity policy is even more compelling."[126]

### c. Enterprise Services

50. We deny Qwest's request for forbearance with regard to enterprise services due to a lack of serving area-wide information for the Omaha MSA. The precedent relevant to the Commission's assessment of dominance consistently has distinguished between mass market and enterprise services,[127] and that distinction guides our analysis here. Instead, Qwest has submitted its case for a broader product market.[128] Qwest has not provided sufficient data for its service territory for the entire MSA to allow us to reach a forbearance determination under section 10(a) for the enterprise market, and we therefore deny this aspect of the Petition.[129]

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[124] 47 C.F.R. § 61.49.

[125] *See supra* para. 28.

[126] *See supra* para. 30.

[127] *See, e.g., WorldCom/MCI Order*, 13 FCC Rcd at 18040-42, paras. 24-29.

[128] Petition at 6 (seeking forbearance from "the market for services provided under Section 251(c) and selected services under Section 271 provided within the boundaries of the Omaha MSA").

[129] As we explain above, although Qwest seeks forbearance relief from dominant carrier regulations rather than a declaratory ruling that it is non-dominant, in light of the overlap between the forbearance criteria of section 10 and the Commission's dominance analysis, the forbearance analysis from dominant regulation we undertake today is informed by the Commission's precedent analyzing a carrier's market power. *See supra* para. 17. Historically, the Commission has employed different geographic market definitions to carry out the differing statutory, economic, and policy goals of the proceeding at hand, and our approach to markets in this forbearance proceeding tracks the Commission's precedent regarding what is the appropriate geographic market for analysis. For example, when evaluating whether certain network elements should be made available on an unbundled basis, which implicates (continued....)

### C. "Fully Implemented"

51. As a threshold matter, we must consider whether section 10(d) bars the forbearance relief Qwest seeks from section 271 and section 251(c) requirements. Section 10(d) of the Act provides that the Commission may not forbear from applying the requirements of section 271 or section 251(c) unless it determines that those requirements are "fully implemented."[130] We conclude that those sections are "fully implemented" and may be forborne from.

#### 1. Section 10(d) As It Relates to the Requirements of Section 271

52. Qwest seeks forbearance from section 271(c)(2)(B)(i-vi) and (xiv). We conclude that section 10(d) does not prevent us from granting Qwest forbearance relief from these checklist portions of 271(c). Subsequent to the filing of Qwest's Petition and comments in the instant proceeding, the Commission held in the *Section 271 Broadband Forbearance Order* that the checklist portion of section 271(c) is "fully implemented" once section 271 authority is obtained in a particular state.[131] Accordingly, because Qwest has obtained section 271 authority in Nebraska and Iowa[132] (as all the BOCs have in all their states), the checklist requirements of section 271(c) have been "fully implemented" for purposes of section 10(d).

(Continued from previous page)
issues of economic self-provisioning, the Commission has focused its analysis on wire centers, which also is the approach we adopt today when analyzing Qwest's unbundling obligations arising under section 251 and section 271 of the Act. *See, e.g., Triennial Review Remand Order*, 20 FCC Rcd at 2581-85, paras. 79-85 (analyzing dedicated transport impairment at the "very detailed level" of specific routes between wire centers); *see also id.* at 2619-25, paras. 155-65 (conducting a wire center-based impairment analysis for high capacity loops); *see also infra* Parts III.D, III.E (analyzing forbearance from section 251 and section 271 obligations on a wire center basis). By comparison, the Commission previously has conducted its dominance analysis in broader geographic markets, which also is the approach we adopt today when evaluating Qwest's request for relief from dominant carrier regulations. *See, e.g., AT&T Reclassification Order*, 11 FCC Rcd at 3286, para. 22 (adopting a national geographic market).

[130] 47 U.S.C. § 160(d).

[131] *See Section 271 Broadband Forbearance Order*, 19 FCC Rcd at 21503-04, para. 17 (rejecting the argument that the "fully implemented" language contains competitive thresholds); *see id.* at 21512, para. 35 (rejecting the argument that section 271(d)(4) precludes a grant of forbearance relief under section 10 as "inconsistent with the plain terms of the statute"); *see id.* at 21502-04, paras. 12-18. We therefore reject the arguments of several commenters that the Commission cannot forbear from application of a checklist requirement, either because section 271 has not been "fully implemented," *see, e.g.*, AT&T Comments at 26; Sprint Comments at 13, or because section 271(d)(4) prohibits the Commission, "by rule or otherwise," from "limit[ing] or extend[ing] the terms used in the competitive checklist," *see, e.g.*, Sprint Comments at 3; McLeodUSA Comments at 3. CompTel suggests that section 271 is not fully implemented until a minimum of three years after long-distance authority has been granted in a particular state. *See* CompTel Comments at 8. The Commission has rejected this argument. *Section 271 Broadband Forbearance Order*, 19 FCC Rcd at 21504, para. 18 (holding that the "fully implemented" language of section 10(d) must be read in context and that the section 272 requirements, which sunset at a minimum three years after section 271 approval has been granted, are distinct from the other requirements of section 271).

[132] *See Qwest IA/NE Section 271* Order, 17 FCC Rcd 26303.

### 2. Section 10(d) As It Relates to the Requirements of Section 251(c)

53. We conclude that section 251(c) is "fully implemented" for all incumbent LECs nationwide. Specifically, we conclude that section 251(c) is "fully implemented" because the Commission has issued rules implementing section 251(c) and those rules have gone into effect. We believe the interpretation we adopt today is the most natural reading of statute.[133] The Commission is the entity that "implements" section 251(c), and hence the full implementation of section 251(c) is triggered by action taken by this Commission. In contrast, incumbent LECs *comply* with section 251(c) and the Commission's rules, but in this context are not properly said to be implementing this statutory provision. Our interpretation that the Commission is the entity that implements section 251(c) also is the interpretation most consistent with section 251(d)(1), which directs the Commission within six months after section 251(c) was enacted to "complete all actions necessary to establish regulations to *implement* the requirements of" section 251.[134] Therefore, it is these rulemaking activities, by which the Commission established regulations to implement the requirements of section 251(c), that most properly represent the threshold activity that must occur before the Commission can forbear from applying the requirements of section 251(c).

54. The interpretation we adopt today regarding when section 251(c) is fully implemented is similar in approach to the Commission's previous interpretation of section 10(d) as applied to section 271(c).[135] To the extent there are differences in our interpretation of section 10(d) as it applies to sections 251(c) and 271(c), those differences result from and track statutory differences.[136] In the *Section*

[133] Section 10(d) provides in relevant part that "the Commission may not forbear from applying the requirements of section 251(c) or 271 under subsection (a) of this section until it determines that those requirements have been fully implemented." 47 U.S.C. § 160(d). As used in this context, we find that the phrase "until it determines that those requirements have been fully implemented" refers to the Commission and indicates that Congress intended for us to determine when the requirements of section 251(c) have been fully implemented. We believe, therefore, that when the D.C. Circuit stated in 2001 that the requirements of section 251(c) had not been fully implemented, it merely referred to the fact that the Commission had not yet found that the requirements of section 251(c) were fully implemented. *Association of Communications Enters. v. FCC*, 235 F.3d 662, 666 (D.C. Cir. 2001).

[134] 47 U.S.C. § 251(d)(1) (emphasis added).

[135] In the present context, we conclude that section 251(c) is fully implemented once the Commission has completed its work of promulgating rules implementing section 251(c) and those rules have taken effect. In the context of the competitive checklist items of section 271(c), the Commission previously has determined that the checklist items are fully implemented once "there is nothing further the Commission or the BOC needs to do in order to implement the checklist." *Section 271 Broadband Forbearance Order*, 19 FCC Rcd 21503, para. 16. In each case, the statutory provision to which section 10(d) applies is fully implemented as soon as whatever predicate actions must occur in order to create ongoing legal obligations under the statutory provision at issue have transpired.

[136] For example, where the obligations of the Act are not ongoing obligations but instead have a sunset date, the Commission has held that such obligations are fully implemented after that sunset date has passed. *See Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(A)(2) of the Commission's Rules*, CC Docket No. 96-149, Memorandum Opinion and Order, 18 FCC Rcd 23525, 23530, para. 7 (2003) (denying a request for forbearance from the separate operating, installation, and maintenance functions of section 272 – as referenced in section 271(d) – on the basis that the section 272 separate affiliate requirements are not "fully implemented" until three years past the date that the Commission has granted section 271 in-region interLATA service to a BOC in a particular state). In the *Advanced Services Order*, the Commission denied the petitions of several BOCs requesting forbearance from the requirements of sections 251(c) and/or section 271 and concluded that "Congress did not provide us with the statutory authority to (continued....)